90-649

No. .....

In The

Supreme Court of the United States

October Term, 1990

SCHERY ANN DRAPER,

Petitioner,

v.

STATE OF IOWA,

Respondent.

On Writ of Certiorari From Judgment of the Supreme Court of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. SUBSTANTIAL EVIDENCE OF INCOMPETENCY TO STAND TRIAL, AS DEMONSTRATED BY MRS. DRAPER, MANDATES A COMPETENCY HEARING AND THE IOWA DISTRICT COURT'S FAILURE TO HOLD SUCH A COMPETENCY HEARING ABROGATES FEDERAL CONSTITUTIONAL PRESCRIPTIONS

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the action before the Supreme Court of Iowa.

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OPINIONS BELOW

The judgment and sentencing of the Iowa District Court and the opinion of the Iowa Court of Appeals are unreported. The opinion of the Iowa Supreme Court is reported at 457 N.W.2d 600 (Iowa 1990). The denial of rehearing by the Iowa Supreme Court is unreported.

JURISDICTION OF THE COURT

Application for Further Review to the Iowa Supreme Court of the Iowa Court of Appeals' affirmation of the Iowa District Court's decision was granted and on June 20, 1990, the Iowa Supreme Court affirmed the Iowa Court of Appeals judgment. A timely Petition for Rehearing in the Supreme Court of Iowa was filed July 3, 1990 and denied by the Supreme Court of Iowa on July 20, 1990. Copies of the Iowa Court of Appeals opinion, the Iowa Supreme Court opinion and the Iowa Supreme Court denial of rehearing are appended to this petition in the Appendix.

Jurisdiction of this Court is grounded on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The fifth, sixth and fourteenth amendments to the United States Constitution are implicated herein. Those amendments are reprinted in the Appendix to this Petition.

STATEMENT OF THE CASE

On June 29, 1987, Schery Ann Draper ("Mrs. Draper") was charged in the Woodbury County District Court, Sioux City, Iowa, by Trial Information #42544, with four counts (I, II, III and IV) of violating the Uniform Controlled Substances Act (Iowa Code Section 204.401); and with two counts of possession of a firearm by a felon (Counts VI and VII), those counts being later separated and eventually dismissed by the State.

Mrs. Draper's trial commenced on January 12, 1988. On January 14, 1988, co-defendant Patrick Harper ("Mr. Harper"), who had been present for the commencement of trial on January 12, 1988, was hospitalized, having suffered a brain aneurysm the previous night. Mr. Harper, who lived in the basement of Mr. and Mrs. Draper's home, was Mrs. Draper's first cousin. Mrs. Draper and Mr. Harper were extremely close as they had been raised together by Mrs. Draper's grandmother. Mr. Harper had lived in Mrs. Draper's home for a number of years which further maintained this strong tie.

Mrs. Draper was therefore understandably distraught upon learning of Mr. Harper's hospitalization and condition. Consequently, on January 14, 1988, Mrs. Draper filed a motion to continue the case for a minimum of two weeks. The basis for the motion to continue turned on Mrs. Draper's inability to assist her counsel due to her distress as to Mr. Harper's condition, her constant attendance at Mr. Harper's bedside, and her decision-making as to surgery for Mr. Harper. Mrs. Draper's counsel himself noted in the motion to continue that Mrs. Draper was unable to presently assist him in the case. The court did grant the motion to continue in part and recessed jury selection until Tuesday, January 19, 1988.

On January 19, 1988, Mrs. Draper filed a second Motion to Continue. She asked for a thirty day continuance and stated by affidavit that she had a very close personal relationship with Mr. Harper as a result of having been raised with him by her grandmother and as a result of his living in her house for a number of years. At the time of the motion, Mr. Harper was in critical condition and surgery was anticipated. Mrs. Draper stated that she did not know if she would be able to concentrate on the proceedings and fully and fairly help her counsel in her defense if the trial reconvened as Mr. Harper remained in critical condition. She also stated in the affidavit that she had been spending almost all of her time at the hospital since January 15, 1988–the day succeeding Mr. Harper's hospitalization–and therefore she was exhausted due to lack of sleep. She further stated in the affidavit that she simply could not concentrate emotionally until Mr. Harper stabilized.

At the hearing before the Court on Mrs. Draper's Motion to Continue, Mr. Harper's attorney informed the Court that he had

received word from Dr. Miller, who was attending Mr. Harper, that Mrs. Draper had been almost continually at Mr. Harper's bedside since Mr. Harper's hospitalization.

The Court then granted a brief continuance, deciding that Mr. Harper's condition indeed might affect Mrs. Draper's ability to concentrate during the trial. The Court continued the trial for two additional days, from Tuesday, January 19, 1988 until Thursday, January 21, 1988.

Jury selection resumed on January 21, 1990, despite Mr. Harper's unchanged condition. Seven days later, on January 28, 1988, Mr. Harper died from complications arising from the brain aneurysm. That same day, Mrs. Draper's counsel requested the Court determine whether Mrs. Draper was competent or incompetent in her ability to participate in the trial. Mrs. Draper's counsel stated in Mrs. Draper's written motion for such a hearing that Mrs. Draper had spent all of her time at the hospital attending to Mr. Harper, both during his periods of consciousness and unconsciousness. The remainder of the time she was either in Court or sleeping. Since Mr. Harper's hospitalization, she had not slept more than two or three hours per night, on the average. Mrs. Draper, as stated in the motion, had participated in critical medical decisions affecting Mr. Harper's life or death.

Mrs. Draper was present at Mr. Harper's bedside moments before he died and left moments before his death because she became ill herself. Mrs. Draper only slept two hours the night of Mr. Harper's death and she was extremely upset by Mr. Harper's death when the motion was presented. She was participating in making funeral arrangements for Mr. Harper's funeral, set for Saturday, January 30, 1988.

Most importantly, counsel stated that he had talked with Mrs. Draper from approximately 8:30 to 9:00 a.m. on January 28, 1990, the morning of Court, and the morning of Mr. Harper's death, and had noticed that Mrs. Draper's conversation was very disjointed and she jumped from one subject to the next without any connection. Counsel was unable to understand Mrs. Draper's jumps in conversation and what she was relating to him because of the disjointed statements she was making.

It appeared to Mrs. Draper's counsel, Mr. Munger, and was stated to the Court by Mr. Munger in the motion that Mrs. Draper may not be able to participate in the trial, to assist him in the preparation of her defense and enable him to effectively confront and cross-examine witnesses and present evidence in her defense and to develop her defense in a full and fair manner.

The motion, accompanied by a brief, was filed at 3:57 p.m. on January 28, 1990. (The Court had earlier, at approximately 10:00 a.m., January 28, 1990, recessed until the next morning at approximately 8:30 a.m., upon learning of Mr. Harper's death.) The recess was to allow Mrs. Draper to participate in the funeral arrangements and to get some additional rest. The Court, prior to that recess, had questioned Mrs. Draper as to whether she would be able to participate if the Court resumed later that same afternoon – January 28th – and her response was:

> Well, I hope so, it was quite an ordeal last night. We were right with him until he died, and it was horrible. And then I don't know - I hope I can.

At 8:21 a.m. on January 29, 1988 Court resumed. Not more than two minutes after resuming, the Court made the following finding:

> ...there has been no substantial evidence to indicate that... Schery Ann Draper is incompetent to continue with the trial of this case...there is no substantial showing that would create any doubt as to her ability to serve, that is, to continue with her assisting her attorney in her defense of this case.
>
> I am well aware that - that she is grieving the loss of Mr. Harper. There is no question about that. The - however, the Court has observed Mrs. Draper in the courtroom, and she assists her counsel at all times. She visits with him. Prior to the time, of course, that Mr. Harper sustained his illness, she was very active in the voir dire selection, helping her attorney. Even after Mr. Harper became ill, she was very active in participating, visiting with him and consulting with him with regard to various matters, in particular the cross-examination of the witness now before the jury.

I noted that when they were discussing the house and that sort of thing, that she was – appeared to be pointing things out to Mr. Munger to assist him in the cross-examination. I visited with her briefly on the record prior to our recess yesterday, and she seemed to be quite responsive and answered my questions intelligently.

The–it appears to the Court that, based upon the contents of the motion and what I observed in a response to me, that–that there is–no doubt has arisen as to her ability to assist her attorney or her–no doubt has arisen to her competency to participate in the trial.

And so the Court believes that she is competent to continue and there is no indication on the record so far that there is any need to have a competency hearing with regard to her ability to continue. Therefore, the motion filed on behalf of Schery Draper on January 28th regarding the request that a hearing be held as to her competency is hereby overruled.

Trial therefore recommenced on January 29, 1988. The jury convicted Mrs. Draper on Counts I, II, and III, and convicted Mrs. Draper on a lesser included offense on Count IV. The State then immediately tried Mrs. Draper as an habitual offender. On March 4, 1988, Mrs. Draper was sentenced on Counts I, II, III and IV by Judge Walsh. Mrs. Draper then received three fifteen year sentences on Counts I, II, and III, all to be concurrently served, and a 180 day concurrent imprisonment on Count IV. The Court then also sentenced Mrs. Draper as an habitual offender to a fifteen year concurrent sentence with Counts I-IV above and with a three-year minimum on that habitual offender sentence.

Notice of Appeal was filed on April 15, 1988 with the Iowa Supreme Court. The Iowa Supreme Court, pursuant to its statutory discretion, sent the case to the Iowa Court of Appeals. Defendant's Brief to the Iowa Supreme Court iterated, at greater length, the argument made by counsel on January 28, 1990 for a competency hearing and the abrogation of state statutory and constitutional precepts and federal constitutional precepts requiring such a hearing.

The Iowa Court of Appeals, on January 25, 1990, affirmed Mrs. Draper's convictions and sentencing but reversed and remanded for resentencing on the habitual offender conviction. The Iowa Court of Appeals stated that the Iowa District Court's cursory review of Mrs. Draper's competency comported with state statutory and constitutional guidelines and federal constitutional guidelines.

The Iowa Court of Appeals' decision was appealed on February 13, 1990 to the Iowa Supreme Court; the Iowa Supreme Court affirmed, on June 20, 1990, the Iowa Court of Appeals' decision. The Iowa Supreme Court adopted the rationale adumbrated by the Iowa Court of Appeals and denied that Mrs. Draper's denial of a competency hearing prejudiced her.

A Petition for Rehearing was filed with the Iowa Supreme Court on July 3, 1990. The Iowa Supreme Court denied that Petition for Rehearing on July 20, 1990.

REASON FOR GRANTING THE WRIT

I. SUBSTANTIAL EVIDENCE OF INCOMPETENCY TO STAND TRIAL, AS DEMONSTRATED BY MRS. DRAPER, MANDATES A COMPETENCY HEARING AND THE IOWA DISTRICT COURT'S FAILURE TO HOLD SUCH A COMPETENCY HEARING ABROGATES FEDERAL CONSTITUTIONAL PRESCRIPTIONS

The Iowa District Court denied Mrs. Draper a competency hearing on the basis that:

1. There was no substantial evidence to indicate that Schery Ann Draper was incompetent to continue with the trial.

2. There was no substantial evidence that would create any doubt as to her ability to serve or to continue with assisting her attorney in the defense of her case.

3. There was no need for a competency hearing with regard to her ability to continue.

The Court's ruling was based on the Court's personal,

unrecorded observations made, for the most part, prior to Mr. Harper's death and after a "brief" visit on the record prior to the recess on the 28th, which was before the motion was filed.

The sixth amendment to the United States constitution states, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

The 14th amendment to the United States Constitution prescribes the application of the sixth amendment to the states. *See Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). A fundamental facet of the sixth amendment is that the defendant must be competent to stand trial. Competence to stand trial is defined below:

> In order to be competent to stand trial one must have 'the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.' *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975). Defendant must have 'a sufficient ability to consult with his lawyer with a reasonable degree of rational understanding—and***[have] a rational as well as factual understanding of the proceedings against him.' *Dusky v. United States,* 362 U.S. 402, 403, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960).

Speedy v. Wyrick, infra, at 725. Deprivation of one's right *not* to be tried when incompetent constitutes an abrogation of due process. *Pate v. Robinson,* 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *Drope v. Missouri, supra.*

A defendant's competency to stand trial involves a two-step analysis: 1) does substantial evidence exist which throws doubt over defendant's competence?; and, 2) if such substantial evidence does exist, was defendant accorded a proper competency hearing on that matter?

A due process evidentiary hearing is constitutionally compelled at any time that there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial. *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). This two-step analysis is drawn from *Moore v. United States,* 464 F.2d 663, 666 (9th Cir. 1972) (Per Curiam), which interprets *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), as follows:

> ...a due process evidentiary hearing is constitutionally compelled at any time that there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial. 'Substantial evidence' is a term of art. 'Evidence' encompasses all information properly before the court, whether it is in the form of testimony or exhibits formally admitted or it is in the form of medical reports or other kinds of reports that have been filed with the court. Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competency to stand trial. *Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence.* [Emphasis added]. The function of the trial court in applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? Its sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue.

The final sentence of the above *Moore* quote is echoed in a later case: "A trial court should sua sponte order a competency hearing when there is a reasonable doubt about the defendant's competency to stand trial." *Speedy v. Wyrick*, 702 F.2d 723, 725 (8th Cir. 1983); *Lindhorst v. United States*, 658 F.2d 598, 607 (8th Cir. 1981), *cert. denied*, 454 U.S. 1153, 102 S.Ct. 1024, 71 L.Ed.2d 309 (1982).

While a later competency hearing might have partially rectified Mrs. Draper's problem, no contemporaneous *or* later such competency hearing was ever held by the Iowa district court. *See Campbell v. A.L. Lockhart*, 789 F.2d 644 (8th Cir. 1986).

This Court has indicated that the quantum of evidence necessary to require a competency hearing may consist of "a defendant's irra-

tional behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial. *Drope, supra*, 420 U.S. at 180. *Drope* added that," [E]ven one of these factors standing alone may, in some circumstances, be sufficient." *Id. See also Speedy v. Wyrick*, 702 F.2d 723 (8th Cir. 1983).

Counsel's professional statement as to his client's irrational behavior falls within the ambit of substantial evidence of incompetency. As stated in *Jones v. District Court, Etc.*, 617 P.2d 803, 808 (D. Colo. 1980):

> [c]ounsel's first-hand evaluation of a defendant's ability to consult on his case and to understand the charges and proceedings against him may be as valuable as an expert psychiatric opinion on his competency...*the defense attorney's representation to the court raised a substantial issue on the petitioner's competency to stand trial, and the respondent court's refusal to make any inquiry into that issue or to receive any evidence in that regard constituted an abuse of discretion.* [Emphasis added].

The thrust of the fifth, sixth and 14th amendments to the United States Constitution is that the court must assess whether substantial evidence of defendant's incompetency exists. The court must review the evidence presented to determine if such substantial evidence exists, and whether defendant's concomitant due process rights would be violated by proceeding with the trial. The record herein reveals a woeful absence of the trial court's review of whether such substantial evidence of Mrs. Draper's incompetency existed. The court focused on the possible delay and inconvenience to the jury rather than the injury Mrs. Draper would suffer by proceeding to trial. The extent of the court's assessment of Mrs. Draper's competency consisted of a colloquy in which the court inquired whether Mrs. Draper could continue with trial on the afternoon of January 28th–the court's questions being occasioned by Mr. Harper's death during the early morning of January 28th. In response to the court's inquiry, Mrs. Draper responded:

> Well, I hope so, it was quite an ordeal last night. We were right with him until he died, and it was horrible. And then I don't know - I hope I can.

Although a motion for continuance based on Mrs. Draper's incompetency was filed by Mrs. Draper *following* the foregoing colloquy, the court made no further inquiry as to Mrs. Draper's competency. Instead, as noted in the Statement of the Case, the court said merely:

> ... there has been no substantial evidence to indicate that... Schery Ann Draper is incompetent to continue with the trial of this case,...there is no substantial showing that would create any doubt as to her ability to serve, that is, to continue with her assisting her attorney in her defense of this case.
>
> I am well aware that–that she is grieving the loss of Mr. Harper. There is no question about that. The–however, the Court has observed Mrs. Draper in the courtroom, and she assists her counsel at all times. She visits with him. Prior to the time, of course, that Mr. Harper sustained his illness, she was very active in the voir dire selection, helping her attorney. Even after Mr. Harper became ill, she was very active in participating, visiting with him and consulting with him with regard to various matters, in particular the cross-examination of the witness now before the jury.
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> I noted that when they were discussing the house and that sort of thing, that she was–appeared to be pointing things out to Mr. Munger to assist him in the cross-examination. I visited with her briefly on the record prior to our recess yesterday, and she seemed to be quite responsive and answered my questions intelligently.
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> The - it appears to the Court that, based upon the contents of the motion and what I observed in a response to me, that–that there is–no doubt has arisen as to her ability to assist her attorney or her–no doubt has arisen to her competency to participate in the trial.
>
> And so the Court believes that she is competent to continue and there is no indication on the record so far that there is any need to have a competency hearing with regard to her ability to continue.

> Therefore, the motion filed on behalf of Schery Draper on January 28th regarding the request that a hearing be held as to her competency is hereby overruled.

The Iowa District Court's finding of competency, absent a competency hearing, clearly contravenes *Drope* and *Pate* and their progeny. *Drope* and *Pate* firmly require competency hearings when *any* doubt as to defendant's competence arises either before or during the trial. The Iowa District Court collapsed the analysis: the court supplanted a competency hearing with its own abbreviated review.

Drope and *Pate* contemplate that upon *any* doubt being raised as to defendant's competence, a competency hearing is immediately mandated. *Drope* and *Pate* certainly do not foresee a court reviewing this doubt absent a formal competency hearing and then proceeding with trial; rather, the court, upon learning of counsel's concerns as to Mrs. Draper's competence, should have immediately suspended trial and held a competency hearing. Moreover, the court's two question colloquy with Mrs. Draper, occurring prior to her motion to continue due to lack of competency, was vastly insufficient to probe whether Mrs. Draper was indeed incompetent. That brief colloquy certainly cannot qualify as a "competency hearing" in the spirit of *Drope* and *Pate*.

Drope also adds," [e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope, supra*, 420 U.S. at 181.

Certainly circumstances changed radically upon Mr. Harper's hospitalization and death. The level of competence Mrs. Draper held prior to the trial was dramatically affected by Mr. Harper's medical condition. This fact was apparent to counsel and communicated to the Court. Counsel's professional statement, as stated by *Jones, supra*, raised substantial evidence of Mrs. Draper's competency. Substantial evidence of incompetency, in accord with this Court's clear pronouncements, requires a competency hearing to allow the court to decide whether the defendant is incapable of proceeding with trial. The continuation of Mrs. Draper's trial, in spite of Mrs. Draper's incompetence, contravened all notions enter-

tained by this Court and other courts as to the vitality of federal and state constitutional protections accorded defendants to insure that defendants obtain a fair trial.

CONCLUSION

It is respectfully requested this Writ of Certiorari be granted and this Court dismiss the convictions against Petitioner, or, in the alternative, grant Petitioner a new trial.

Respectfully submitted,

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IOWA COUNSEL OF RECORD FOR PETITIONER

PROOF OF SERVICE

I certify that on this 19th day of October, 1990, I served the within Writ of Certiorari by mailing three copies to the following party in this matter at his respective address as shown below:

THOMAS J. MILLER
Attorney General
Criminal Appeals Division
Hoover State Office Building
Des Moines, IA 50319
(515) 281-5164

I further certify that on this 19th day of October, 1990, I will file the within Writ of Certiorari by mailing forty copies of it to the Clerk of the Supreme Court, Supreme Court Bldg., 1 First Street, N.E., Washington, D.C. 20543, Tel. (202) 479-3000.

William Jefferson Giles, III
752 Frances Building
Sioux City, IA 51102
(712) 252-4458

APPENDIX

IN THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY

STATE OF IOWA, Plaintiff,	)	Criminal No. 42544
	)	JUDGMENT
vs.	)	
	)	COUNT I
SCHERY ANN DRAPER, Defendant.	)	

Now, on this 14th day of April, 1988, the above matter comes before the Court for pronouncing judgment and sentencing, this being the time set by prior order therefore. The State appears by J. Keith Rigg, and the Defendant appears in person and by attorney Stanley Munger.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Defendant stands convicted and is guilty of the crime of Delivery of a Controlled Substance, Methamphetamine–Count I, in violation of Section 204.401(1) of the Iowa Code. The jury also determined that the Defendant was the same person who had been convicted of at least two prior felonies.

2. After reviewing all pertinent information herein, the Court has considered all of the sentencing options available in this case. The Defendant is sentenced under Section 204.401(1)(b) and 902.8 and 902.9(2) of the Iowa Code as a habitual offender and is committed to the custody of the Director, Iowa Department of Corrections, for a term not to exceed fifteen (15) years. Because the Defendant is sentenced as a habitual offender, the Defendant is informed that she will not be eligible for parole, under the sentence in this count, until the Defendant has served the minimum sentence of confinement of three years.

The Medical and Classification Center at Oakdale, Iowa, is designated as the reception center to which the Defendant is to be delivered by the Sheriff. The Sheriff of Woodbury County shall have temporary custody over the Defendant pending the Defendant's transfer to the custody of the Director, Iowa Department of Corrections. Woodbury County shall pay the cost of temporarily confining and transporting the Defendant. When the Defendant is transported to the Center at Oakdale, Iowa, the Defendant shall be accompanied by a person of the same sex. (See Iowa Code Section 901.7 as amended.)

Mittimus shall issue forthwith.

3. The Court's reasons for selecting this sentence are enumerated in the record.

4. Appeal bond is fixed at $100,000.00, plus 15 percent surcharge which shall be cash or approved surety only. The appeal bond of $100,000.00 plus 15 percent surcharge shall be the total bond and will cover Counts I, II and III. The Defendant's appearance bond in District Court shall not be discharged because it also stands as the bond in the severed counts in this case and in a pending case against the Defendant in Case No. 42635 in Woodbury County. The court costs are assessed against the Defendant.

5. The Defendant was notified of her right to appeal pursuant to Iowa R. Crim. P. 22(3)(e) (see record).

BY THE COURT:

/s/ Michael S. Walsh
MICHAEL S . WALSH, Judge of the
Third Judicial District of Iowa

The Clerk to send copies to: Counsel of record.

IN THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY

STATE OF IOWA, Plaintiff,	)	Criminal No. 42544
	)	JUDGMENT
vs.	)	
	)	COUNT II
SCHERY ANN DRAPER, Defendant.	)	

Now, on this 14th day of April, 1988, the above matter comes before the Court for pronouncing judgment and sentencing, this being the time set by prior order therefore. The State appears by J. Keith Rigg, and the Defendant appears in person and by attorney Stanley Munger.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Defendant stands convicted and is guilty of the crime of Delivery of a Controlled Substance, Methamphetamine – Count II, in violation of Section 204.401(1) of the Iowa Code. The jury also determined that the Defendant was the same person who had been convicted of at least two prior felonies.

2. After reviewing all pertinent information herein, the Court has considered all of the sentencing options available in this case. The Defendant is sentenced under Section 204.401(1)(b) and 902.8 and 902.9(2) of the Iowa Code as a habitual offender and is committed to the custody of the Director, Iowa Department of Corrections, for a term not to exceed fifteen (15) years. This sentence shall run concurrently with the sentence imposed under Count I in this case. Because the Defendant is sentenced as a habitual offender, the Defendant is informed that she will not be eligible for parole, under the sentence in this count, until the Defendant has served the minimum sentence of confinement of three years.

The Medical and Classification Center at Oakdale, Iowa, is designated as the reception center to which the Defendant is to be

delivered by the Sheriff. The Sheriff of Woodbury County shall have temporary custody over the Defendant pending the Defendant's transfer to the custody of the Director, Iowa Department of Corrections. Woodbury County shall pay the cost of temporarily confining and transporting the Defendant. When the Defendant is transported to the Center at Oakdale, Iowa, the Defendant shall be accompanied by a person of the same sex. (See Iowa Code Section 901.7 as amended.)

Mittimus shall issue forthwith.

3. The Court's reasons for selecting this sentence are enumerated in the record.

4. Appeal bond is fixed at $100,000.00. plus 15 percent surcharge which shall be cash or approved surety only. The appeal bond of $100,000.00 plus 15 percent surcharge shall be the total bond and will cover Counts I, II and III. The Defendant's appearance bond in District Court shall not be discharged because it also stands as the bond in the severed counts in this case and in a pending case against the Defendant in Case No. 42635 in Woodbury County. The court costs are assessed against the Defendant.

5. The Defendant was notified of her right to appeal pursuant to Iowa R. Crim. P. 22(3)(e) (see record).

BY THE COURT:

/s/ Michael S. Walsh
MICHAEL S. WALSH, Judge of the
Third Judicial District of Iowa

The Clerk to send copies to: Counsel of record.

IN THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY

STATE OF IOWA, Plaintiff,	)	Criminal No. 42544
	)	JUDGMENT
SCHERY ANN DRAPER, Defendant.	)	COUNT III

Now, on this 14th day of April, 1988, the above matter comes before the Court for pronouncing judgment and sentencing, this being the time set by prior order therefore. The State appears by J. Keith Rigg, and the Defendant appears in person and by attorney Stanley Munger.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Defendant stands convicted and is guilty of the crime of Possession of a Controlled Substance, Methamphetamine, With the Intent to Deliver–Count III, in violation of Section 204.401(1) of the Iowa Code. The jury also determined that the Defendant was the same person who had been convicted of at least two prior felonies.

2. After reviewing all pertinent information herein, the Court has considered all of the sentencing options available in this case. The Defendant is sentenced under Section 204.401(1)(b) and 902.8 and 902.9(2) of the Iowa Code as a habitual offender and is committed to the custody of the Director, Iowa Department of Corrections, for a term not to exceed fifteen (15) years. This sentence shall run concurrently with the sentence imposed under Count I in this case. Because the Defendant is sentenced as a habitual offender, the Defendant is informed that she will not be eligible for parole, under the sentence in this count, until the Defendant has served the minimum sentence of confinement of three years.

The Medical and Classification Center at Oakdale, Iowa, is designated as the reception center to which the Defendant is to be delivered by the Sheriff. The Sheriff of Woodbury County shall have

temporary custody over the Defendant pending the Defendant's transfer to the custody of the Director, Iowa Department of Corrections. Woodbury County shall pay the cost of temporarily confining and transporting the Defendant. When the Defendant is transported to the Center at Oakdale, Iowa, the Defendant shall be accompanied by a person of the same sex. (See Iowa Code Section 901.7 as amended.)

Mittimus shall issue forthwith.

3. The Court's reasons for selecting this sentence are enumerated in the record.

4. Appeal bond is fixed at $100,000.00 , plus 15 percent surcharge which shall be cash or approved surety only. The appeal bond of $100,000.00 plus 15 percent surcharge shall be the total bond and will cover Counts I, II, and III. The Defendant's appearance bond in District Court shall not be discharged because it also stands as the bond in the severed counts in this case and in a pending case against the Defendant in Case No. 42635 in Woodbury County. The court costs are assessed against the Defendant.

5. The Defendant was notified of her right to appeal pursuant to Iowa R. Crim. P. 22(3)(e) (see record).

BY THE COURT:

/s/ Michael S. Walsh
MICHAEL S. WALSH, Judge of the
Third Judicial District of Iowa

The Clerk to send copies to Counsel of record.

IN THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY

STATE OF IOWA Plaintiff,	)	Criminal No. 42544
	)	JUDGMENT
vs.	)	
	)	COUNT IV
SCHERY ANN DRAPER, Defendant.	)	

Now, on this 14th day of April, 1988, the above matter comes before the Court for pronouncing judgment and sentencing, this being the time set by prior order therefore. The State appears by J. Keith Rigg, and the Defendant appears in person and by attorney Stanley Munger.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Defendant stands convicted and is guilty of the crime of Possession of a Controlled Substance, Marijuana–Count IV, in violation of Section 204.401(3) of the Iowa Code.

2. After reviewing all pertinent information herein, the Court has considered all of the sentencing options available in this case. The Defendant is sentenced under Section 204.401(3) of the Iowa Code and is committed into the custody of the Woodbury County Sheriff for incarceration in the Woodbury County jail for 180 days. Mittimus shall issue forthwith. This sentence shall run concurrently with the sentence imposed under Count I in this case.

3. The Court's reasons for selecting this sentence are enumerated in the record.

4. The Defendant shall be given credit upon the term of her sentence rendered herein for ten (10) days during which she was confined to the county jail or other correctional or mental institution at any time prior to sentencing.

5. Appeal bond is fixed at $ 1,000.00, plus 15 percent surcharge which shall be cash or approved surety only. The Defendant's appearance bond in District Court shall not be discharged because it also stands as the bond in the severed counts in this case and in a pending case against the Defendant in Case No. 42635 in Woodbury County. The court costs are assessed against the Defendant.

6. The Defendant was notified of her right to appeal pursuant to Iowa R. Crim. P. 22(3)(e) (see record).

BY THE COURT:

/s/ Michael S. Walsh
MICHAEL S. WALSH, Judge of the
Third Judicial District of Iowa

The Clerk to send copies to: Counsel of record.

IN THE COURT OF APPEALS OF IOWA
No. 9-309 / 88-592

STATE OF IOWA,
Appellee,

vs.

SCHERY ANN DRAPER,
Appellant.

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Defendant appeals from her conviction, following a jury trial, of two counts of delivery of a controlled substance, one count of possession with intent to deliver, and one count of simple possession. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.

Stanley E. Munger, of Kindig, Beebe, Rawlings, Nieland, Probasco & Killinger, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; Michael M. Hobart, County Attorney; and J. Keith Rigg, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, DONIELSON, J.

On June 2, 1987, Sioux City Police Officer Skaff was contacted by police informant Rhoades (now known as Zappas) about the potential for a sale of controlled substances. Zappas arranged a meeting on June 2nd at which Thomas Whinery sold the officer methamphetamine ("crank").

On June 5th, a second sale was arranged at which Whinery and Randy Frederick sold the officer more crank. A third sale occurred on June 16th between the officer and Frederick and Whinery. During that sale Frederick described an extensive drug processing operation he had engaged in earlier in the day and referred to a "boss lady."

On June 18th Zappas informed the police Frederick was going to talk with his source about further purchases. A police officer followed him to the Draper residence at 3110 Euclid. Shortly thereafter, Frederick called Zappas and informed him he would be able to obtain an ounce of crank.

Following the fourth sale by Frederick and Whinery to Officer Skaff on June 19th, they were arrested. At the police station a message came over Frederick's pager. The message was, "Randy, this is Schery. Give me a call at home."

Police officers then executed a search warrant at the residence occupied by the defendant, Schery Draper, her husband Robert Draper, and Patrick Harper. During the search, police discovered methamphetamine, marijuana, and numerous items indicating the presence of a drug processing operation. The Drapers and Harper, along with Whinery and Frederick, were jointly charged with various violations of the Uniform Controlled Substances Act and in due course appeared in a single trial. The jury found Schery Draper guilty of two counts of delivery of a controlled substance, one count of possession with intent to deliver, and one count of simple possession. She was also found to be an habitual offender.

I. *Competency Hearing*. Defendant contends the trial court erred in failing to hold a hearing to determine whether she was competent to stand trial. The trial began on January 12, 1988, and on January 14th, codefendant Patrick Harper was hospitalized. He died on January 28, 1988, and on that day defendant filed a motion requesting a competency hearing. Defendant and Harper had long shared a close relationship akin to that of a brother and sister (both were raised together by defendant's grandmother and Harper had resided in defendant's home for a number of years). Since Harper's hospitalization on January 14, 1988, defendant had spent all of her time away from the trial with him, and she took part in making his medical decisions. Defendant alleges her distress over Harper's condition and her lack of rest due to her care for him rendered her unable to effectively participate and assist her attorney in the preparation of her defense.

It is fundamental that a defendant may not be tried or convicted while incompetent to stand trial or to assist in his or her

defense. To deprive a person of this right is to deprive him or her of due process and a fair trial. *State v. Lyon*, 293 N.W.2d 8, 9 (Iowa 1980); *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982). Two Iowa statutes set forth the rights of an incapacitated accused to stay a criminal prosecution. Iowa Code §§ 812.3-.4 (1989). These statutes establish a level of competency which demands a defendant appreciate the charge; understand the proceedings; and be able to effectively assist in the defense. *Lyon*, 293 N.W.2d at 9.

When a defendant's competency during trial court proceedings is challenged on appeal, our task is to examine the information before the trial court to determine if an unresolved question of the defendant's competency reasonably appeared. *State v. Stanley*, 344 N.W.2d 564, 571 (Iowa App. 1983). "Because constitutional safeguards are implicated, we make our own evaluation of the totality of the circumstances." *Id.*[1]

The current law requires a hearing on the issue of competency when the record contains information from which a reasonable person would believe a substantial question of the defendant's competency exists. *State v. Kempf*, 282 N.W.2d 704, 706 (Iowa 1979). Relevant factors in determining whether due process requires an inquiry as to competency include (1) defendant's irrational behavior, (2) defendant's demeanor at trial, and (3) any prior medical opinion on defendant's competency to stand trial. *State v. Aswegan*, 331 N.W.2d 93, 96 (Iowa 1983).

A review of the record reveals no evidence reasonably appeared at trial which mandated the need for a competency hearing. Defendant was understandably distressed over the loss of Mr. Harper. Her attorney stated he had a conversation with her on the 28th, and her responses were disjointed and jumped from one topic to another. However, the trial court had the opportunity to view defendant, *see Stanley,* 334 N.W.2d at 571, and it observed her ability to assist and consult with her counsel throughout the trial. The trial judge found defendant's answers to his questions after Harper's death to have been responsive and intelligent. The trial court was correct that despite defendant's bereaved state of mind,

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[1] We reject the State's invitation to apply a less rigorous standard of review.

no question of her competency reasonably appeared. There was no error in denying a competency hearing in this matter.

II. *Motion to Suppress.* Defendant argues the trial court erred in refusing to grant her renewed motion to suppress evidence obtained by execution of a search warrant on June 20, 1987. Without addressing the State's claim that defendant's motion was untimely, we conclude the trial court did not err in overruling defendant's motion to suppress.

A court reviewing the issuance of a search warrant gives great deference to a prior determination of probable cause by a judge or magistrate in inquiring whether the judge or magistrate had a substantial basis for concluding probable cause existed, and it does not make its own independent determination of probable cause. *State v. Bishop,* 387 N.W. 2d 554, 558 (Iowa 1986). Because of a preference for warrants, a court must construe them in a common sense manner and resolve doubtful cases in favor of their validity. *State v. Hennon*, 314 N.W. 2d 405 (Iowa 1982).

The basis for defendant's appeal centers on the dishonest or reckless inclusion of information contained in the warrant. She specifically focuses on information in the warrant she attributes to Zappas, yet of which he later denied having any knowledge. The record reveals the application for a search warrant relied on the information of *separate* informants. An unidentified confidential informant, who had provided the police with reliable information in the past, provided the information set forth in section "B(1)" of the application. This information regarded the processing and dealing of large quantities of drugs from the Draper residence. The deposition of Officer Skaff taken on August 19, 1987, clarified the information found in section "B(1)" of the application was not provided by Zappas.

The record reveals Zappas was involved in setting up the purchases by the undercover officer. Page four of the search warrant application refers to Zappas' role on June 18, 1987. He informed the police Frederick was going to meet with his suppliers; a police officer then verified his presence at the Draper residence.

We do not find any basis for concluding the search warrant

application contained false information. Nor do we find the warrant invalid because of the failure to disclose when the confidential informant observed drug processing activities at the Draper residence. The information in the application from Zappas was time-specific and it substantiated the information supplied by the other informant. The search warrant at issue was not misleading as to the separate roles the informants played.

Probable cause clearly existed to execute a search of the Draper household on June 20, 1987. Defendant's motion to suppress was correctly denied.

III. *Video Statement.* Defendant contends the trial court erred in not forcing the State to turn over the video statement of codefendant Whinery. From our review of the record, it is apparent the trial court did not err.

The trial court repeatedly refused to compel the State to produce Whinery's taped statement because it contained no exculpatory evidence. After Whinery had withdrawn from the plea arrangement, the court allowed him to share his edited, transcribed statements with his codefendants. It is unclear as to why defendant believed Zappas' alleged threat towards Whinery on June 2nd would have any bearing on Draper's alleged involvement in the crimes on the 16th, 19th, and 20th. Zappas testified he did not know Schery Draper, and there was no evidence demonstrating Draper was ever aware of the alleged threat prior to her arrest. The circumstances of the case rendered the tape to be without exculpatory value to defendant.

Even assuming the tape was of some value to defendant, we note she had access to this information at the time of trial and it was used in cross-examining witnesses. The impeachment value of this tape was not denied to defendant.

We are cognizant of the fact the *Brady* rule concerning the suppression of favorable evidence by the prosecution applies to both exculpatory and impeachment evidence. *State v. Anderson*, 410 N.W. 2d 231, 233 (Iowa 1987). The videotaped statements at issue in this case had impeachment potential with regard to Zappas and Officers Skaff and Noltze. However, the State's refusal to provide this information to defendant would not rise to the level of a *Brady*

violation (nor constitute prosecutorial misconduct) because it was not constitutionally "material" to her defense. "Material" evidence required to be disclosed by the State is such that there is a "reasonable" probability if the evidence had been produced, the outcome of the trial would have been different. *Id.* A "reasonable" probability must be so substantial it undermines the confidence in the outcome of the case. *Id.* at 234. As noted above, any alleged threat existing between Zappas and Whinery on the 2nd was unlikely to have any effect on defendant's involvement in crimes alleged on June 16th, 19th, and 20th.

Defendant's ability to use the statement in cross-examination removed the possibility of any reasonable likelihood that any false testimony affected the judgment of the jury. Contrary to her claim, the taped statement was not material to the issue of whether the officers had done a "good job" of executing the search warrant and preserving evidence found at the Draper residence.

IV. *Sufficiency of the Evidence.* Defendant contends there was insufficient evidence to submit this case to a jury and the trial court should have granted her motion for judgment of acquittal. The principles governing a challenge to the sufficiency of evidence have been fully set forth by this court in prior decisions, *see State v. Wheeler,* 403 N.W.2d 58, 60 (Iowa App. 1987), and need not be repeated here. Viewing the evidence in the light most favorable to the State, we find there is substantial evidence in the record from which the jury could have found defendant guilty beyond a reasonable doubt. When searched on June 20, Schery Draper's home contained a vast amount of illegal drugs, various tools and instrumentalities used in the drug trade, and a large amount of cash, including bills which had been transferred in a drug deal between Officer Skaff and Frederick on June 16th. Schery's purse was found in the kitchen, and it alone held crank worth over $10,000. Evidence indicating the role of a "boss lady" in the drug operation and Schery's attempt to page Frederick on the night of his arrest are also probative of her role in the drug transactions. Sufficient evidence existed for the jury's determination.

V. *Jury Instruction.* Schery claims the trial court erred in not giving her requested jury instruction regarding the spoliation of evidence. Without referring to any support in the record, defendant

accuses the State of destroying evidence including fingerprints, a tape recording, and a note found on Mr. Harper's bedroom door. She also claims the police allowed people to intermingle freely in the kitchen where her purse was found containing a large quantity of methamphetamine.

The intentional destruction of exculpatory evidence can be a violation of due process. *Foster v. State,* 378 N.W. 2d 713, 718 (Iowa App. 1985). Where a due process violation occurs due to the State's destruction of evidence, the appropriate remedy is a jury instruction permitting a favorable inference for the defendant from the destruction of the evidence. *State v. Maniccia*, 355 N.W. 2d 256, 259 (Iowa App. 1984). We leave largely in the discretion of the trial court the determination whether a jury should be instructed concerning the inferences it may draw from missing evidence. *State v. Vincik,* 398 N.W.2d 788, 795 (Iowa 1987). However, a "spoliation instruction" should not be submitted to a jury merely upon a claim of spoliation made by a party, but only where substantial evidence exists to support findings that such evidence had been in existence, *State v. Langlet*, 283 N.W. 2d 330, 335 (Iowa 1979), and the evidence suggests destruction of the evidence was intentional. *State v. Ueding,* 400 N.W.2d 550, 552 (Iowa 1987).

Contrary to the bald assertions in her brief, the record contains no evidence that the State intentionally destroyed exculpatory evidence. The trial court did not abuse its discretion in declining to submit a spoliation instruction to the jury.

Defendant also claims the trial court erred in refusing to submit her requested instruction regarding the inferences the jury could draw from cash found on the first floor of her residence and in her husband's wallet. She contends there was nothing particularly significant about the amount of money which was found in the house and on the parties (approximately $14,000). We think the trial court properly left to the jury the decision of what inferences could be drawn from the money. The trial court properly refused to submit defendant's requested instruction.

VI. *Habitual Offender.* Defendant contends the habitual offender statute, Iowa Code section 902.8, was inappropriately applied to her case. She argues Chapter 204 of the Code (Uniform

Controlled Substances Act) contains its own exclusive penalty enhancement provisions and therefore the minimum sentence provisions of section 902.8 do not apply. Although we reject defendant's argument that the penalty provisions of Chapter 204 preclude any application of section 902.8, we remand this matter for resentencing consistent with the mandatory minimum sentence provisions of sections 204.413.

Chapter 204 recognizes the applicability of sanctions found outside the controlled substances act. Iowa Code § 204.404. It also provides penalty enhancement provisions for violators of the chapter's provisions, Iowa Code § 204.414 (treble fine), and for offenders who commit two or more offenses under the chapter. Iowa Code § 204.411 (treble fine and/or sentence.). Only two potential conflicts between Chapter 204 and the habitual offender statute exist. The first regards the different penalty enhancement provisions which exist between section 204.411 and section 902.8. We are not faced with that situation in this case.

The second potential conflict arises when a defendant is convicted for violating section 204.401(1)(a) or (b). In that case, the defendant must serve one-third of the sentence before becoming eligible for parole, Iowa Code § 204.413. [2] In the case of an habitual offender, the minimum sentence required by section 204.413 may be greater than that set forth in section 902.8. Under those circumstances, the specific provisions of section 204.413 would prevail in cases involving violations of section 204.401(1)(a) or (b). An habitual offender sentenced pursuant to section 204.401(1)(a) or (b) would therefore be subject to the maximum sentence provision of section 902.9(2) and the minimum sentence requirements of section 204.413.

The circumstances of this case are such that defendant faces a longer minimum sentence if the penalty enhancement provisions of section 204.413 are applied. Defendant is correct in that the trial court should not have applied the three-year provision of section 902.8 to this case, although she probably did not foresee that appealing this issue

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[2] Mitigating circumstances may exist allowing for a reduction in the sentence by the trial court. Iowa Code § 901.10.

could ultimately result in a lengthening of the sentence she must serve prior to being eligible for parole. We reverse defendant's sentence and remand for resentencing consistent with this opinion.[3]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.

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[3] Our decision with regard to other issues in this opinion makes it unnecessary to address defendant's argument regarding her right to a new trial due to an accumulation of error.

IN THE SUPREME COURT OF IOWA
No. 175 / 88-592
Filed June 20, 1990

STATE OF IOWA,
Appellee,

vs.

SCHERY ANN DRAPER,
Appellant.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Defendant appeals from judgments of conviction and sentences entered after jury verdicts. DECISION OF THE COURT OF APPEALS AFFIRMED; DISTRICT COURT CONVICTIONS AFFIRMED, THREE SENTENCES VACATED AND CASE REMANDED FOR RESENTENCING.

Stanley E. Munger and David L. Reinschmidt of the Munger Law Firm, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Bruce Rempkes, Assistant Attorney General, Thomas S. Mullin, County Attorney, and J. Keith Rigg, Assistant County Attorney, for appellee.

Considered by McGiverin, C.J., and Larson, Carter, Lavorato and Neuman, JJ.

McGIVERIN, C.J.

Defendant Schery Ann Draper, her husband, Robert Draper, and three other individuals were charged by joint trial information with certain violations of the Iowa Controlled Substances Act, Iowa Code chapter 204 (1987). In addition, Drapers were alleged to be habitual offenders under Iowa Code section 902.8.

Schery's case was tried to the jury at the joint trial of all five

defendants. The jury found Schery guilty of two counts of delivery of a controlled substance (methamphetamine) in violation of Iowa Code section 204.401(1) (counts I and II); one count of possession of a controlled substance (methamphetamine) with intent to deliver in violation of Iowa Code section 204.401(1) (count III); and one count of possession of a controlled substance (marijuana) in violation of Iowa Code section 204.401(3) (count IV).

After the substantive offense verdicts were returned, Schery's habitual offender status was tried to the jury. The jury found Schery to be a habitual offender under Iowa Code section 902.8.

Schery's posttrial motions were overruled. The court entered judgments of conviction on the jury verdicts and sentenced Schery to a term of imprisonment not to exceed fifteen years on each of Counts I, II and III, and one 180-day term of imprisonment on count IV, all terms to be served concurrently. The Court ordered that Schery, as a habitual offender, not be eligible for parole until she served three years of her sentences on counts I, II and III in prison. *See* Iowa Code § 902.8.

The jury found Robert Draper guilty of the same counts on which it found Schery guilty, and also found Robert to be a habitual offender.[1] One of the other three codefendants (Patrick Harper, Schery's cousin, who lived in Drapers' home) died during the trial. The other two (Randy Frederick and Tommy Whinery) were convicted as charged, and sentenced.

Schery appealed her convictions and sentences. We transferred the case to the court of appeals.

In the court of appeals Schery argued, among other things, that the sentences given her by the district court on counts I, II and III are illegal because they are more harsh than authorized by the Iowa Code. The court of appeals held that the sentences on those counts are illegal because they are more *lenient* than allowed by the Iowa Code. That court affirmed Schery's convictions but vacated the sentences on counts I, II and III, reasoning that on each of those

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[1] The opinion in Robert's appeal, State v. Robert Draper, filed today, is reported at – N.W. 2d – (Iowa 1990).

counts the district court had imposed an illegal mandatory minimum prison sentence of three years under Iowa Code section 902.8 rather than the requisite five years under Iowa Code section 204.413. The case was remanded for resentencing on those counts.

We granted Schery's application for further review to consider the several issues raised therein.

After considering the record and arguments of counsel, we believe the court of appeals correctly decided the case. Of the issues raised on further review, only the sentencing issue merits discussion here. We, therefore, affirm the decision of the court of appeals and limit our discussion of the law to several aspects of the sentencing issue. We state the basic facts of the case for informational purposes.

I. *Background facts and proceedings.* With the help of an informant, Elias Spiro Zappas, Jr., undercover officer Mark Skaff of the Sioux City police department bought methamphetamine from Frederick and Whinery on four occasions in June 1987. In all, about $3400 worth of methamphetamine was purchased. Skaff wore a wireless transmitter as the deals were consummated.

The first two transactions occurred on June 2 and June 5, after which Frederick informed Skaff that future transactions would have to wait because his "main people" were "on a little vacation."

The third transaction occurred on June 16 when Skaff purchased methamphetamine packaged in a plastic vial with "Anco 100" imprinted on its bottom. Skaff paid for this methamphetamine with $600 in marked bills.

During their secretly taped conversations with Skaff on June 2, 5 and 16, Frederick and Whinery spoke about how they and several other people worked with a "boss" and "boss lady" in the illegal drug business. Frederick described how methamphetamine was packaged for sale on an "assembly line" using inositol to dilute the drug, at a house where they kept a police scanner tuned to police frequencies. Frederick explained that he could be reached over the telephone via his electronic pager, the number of which Whinery had previously given to Skaff.

Frederick was under surveillance for a time on June 18. He was observed driving to and entering Drapers' house in Sioux City immediately after telling Zappas that he (Frederick) was going to check on the availability of drugs for Skaff. Minutes after Frederick entered Drapers' house, Whinery telephoned Zappas to say that methamphetamine was available for the fourth transaction.

The fourth transaction occurred in the evening on June 19. For $2400, Skaff bought methamphetamine packaged in a plastic bag marked with an "O" in felt-tip pen. Frederick and Whinery were immediately arrested. Frederick's car was found to contain more methamphetamine and "Anco 100" vials. About 11:00 p.m., while Frederick and Whinery were being booked, a message came over Frederick's pager: "Randy, this is Schery. Give me a call at home."

Armed with a valid search warrant, officers of the Sioux City police department entered Drapers' house shortly after midnight.

From Drapers' kitchen the officers seized, among other things, a police scanner; a "Rolodex" open to the card with Frederick's name and pager number; a mirror with a straw, two razor blades, and methamphetamine on it; and a purse with Schery's driver's license, Robert's travel discount cards, $500 cash, and about $10,000 worth of methamphetamine, some of it packaged in plastic bags marked with an "O" in felt-tip pen.

From Drapers' upstairs bedroom the officers seized three marked hundred-dollar bills Skaff had given Frederick and Whinery on June 16 in exchange for methamphetamine; a plastic bag of marijuana; another $10,000 cash; and an electronic detector of wireless transmitters, commonly called a "bug alert."

From a basement recreation room the officers seized plastic vials with "100 Anco" imprinted on the bottom; a bottle of inositol; plastic bags; a commercial heat sealer of plastic bags; a box containing a measuring scale, spoons, a razor blade holder, and a felt-tip pen; a grinder; and another scale.

In Harper's unlocked basement bedroom, the officers found a locked sea chest, with the key on a shelf. From the chest the officers seized over four ounces of marijuana; over $2400 cash; a large bag of pure methamphetamine and several small bags of pure and

diluted methamphetamine, together worth over $27,000; a bag of inositol; and a photograph of Frederick and Harper in Harper's bedroom. From the room the officers seized, among other things, a scale, two glass vials of methamphetamine, and three boxes of plastic bags.

In short, the house was infested with drugs and drug paraphernalia. In light of the secretly taped conversations, many of the seized items linked Drapers, Whinery, Frederick and Harper to each other and to officer Skaff's drug purchases.

II. *The correct sentence.* Schery was convicted of three violations of Iowa Code section 204.401 (1) with respect to methamphetamine. Methamphetamine is a schedule II controlled substance. Iowa Code § 204.206(4) (b). It is not cocaine or a narcotic drug. *See* Iowa Code § 204.101(18) (defining "narcotic drug" so as to exclude methamphetamine). As such, violation of section 204.401(1) with respect to methamphetamine is a class "D" felony. Iowa Code § 204.401(1)(b).

A. *The maximum sentence.* In sentencing Schery, the district court looked first to Iowa Code section 902.9 to determine the appropriate sentence for a class "D" felony. That statute provides, in relevant part:

The maximum sentence for any person convicted of a felony shall be that prescribed by statute or, if not prescribed by statute, if other than a class "A" felony shall be determined as follows:

* * *

2. An habitual offender shall be confined for no more than fifteen years.

* * *

4. A class "D" felon, not an habitual offender, shall be confined for no more than five years . . . .

Iowa Code § 902.9. The term "habitual offender" is defined in Iowa Code section 902.8, which provides:

An habitual offender is any person convicted of a class "C" or

> a class "D" felony, who has twice before been convicted of any felony in a court of this or any other state, or of the United States. An offense is a felony if, by the law under which the person is convicted, it is so classified at the time of the person's conviction. A person sentenced as an habitual offender shall not be eligible for parole until the person has served the minimum sentence of confinement of three years.

The jury found that Schery is a habitual offender under Iowa Code section 902.8. The district court concluded that the maximum prison sentence for each of Schery's three convictions under Iowa Code section 204.401(1) is no more than fifteen years. On each of counts I, II and III, the court sentenced Schery to a concurrent term of imprisonment not to exceed fifteen years.

Schery argues, however, that Iowa Code sections 902.8 and 902.9(2) do not apply to the sentencing of violators of the Iowa Controlled Substances Act. She asserts that because chapter 204 has its own enhancement provision applicable to second or subsequent violations of chapter 204 – section 204.411[2] – the enhancement provision found in section 902 .8 and applied through section 902.9(2) does not apply to anyone who violates chapter 204, whether section 204.411 applies or not. See Iowa Code § 204.411; *see also* Iowa Code § 204.414 (prescribing treble fine for any violation of chapter 204, except section 204.401(3)). Her theory is that chapter 204 is "comprehensive and all-encompassing" when it comes to sentencing its violators. Because these violations of chapter 204 are her first violations of chapter 204, Schery concludes that her maximum prison sentence on counts I, II and III can be no more than five years on each count, as provided by section 902.9(4).

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[2] Iowa Code section 204.411 provides:

[1] Any person convicted of a second or subsequent offense under this chapter, may be punished by imprisonment for a period not to exceed three times the term otherwise authorized, or fined not more than three times the amount otherwise authorized, or punished by both such imprisonment and fine.

[2] For purposes of this section, an offense is considered a second or subsequent offense, if, prior to the person's having been convicted of the offense, the offender has ever been convicted under this chapter or under any state or federal statute relating to narcotic drugs or cocaine, marijuana, depressant, stimulant, or hallucinogenic drugs.

[3]This section does not apply to offenses under section 204.401, subsection 3.

We disagree. First, chapter 204 clearly was not intended to stand completely on its own in sentencing. As Schery's own conclusion admits, it is only by looking to chapter 902 that one can determine what sentence is to be imposed for many offenses under chapter 204. Section 204.401(1)(b), for example, simply provides that the offenses of which Schery was convicted are class "D" felonies. One must look to section 902.9 to find the sentence for a class "D" felony. We think that includes not only subsection (4) of section 902.9 (five years for ordinary class "D" felonies), but also subsection (2) of section 902.9 (fifteen years for class "D" felonies by a habitual offender). Section 902.9 dovetails with section 204.401 by stating that it applies to the sentencing of "any person convicted of a felony" unless otherwise specified by another statute.

Second, Schery's interpretation of chapter 204 would lead to an absurd result. Any person whose third felony conviction was a non-chapter 204 felony would receive an enhanced prison sentence under section 902.8 for that conviction, whatever their two prior felonies. But a person whose third felony conviction was a chapter 204 felony and whose two prior felonies were non-chapter 204 felonies would not receive an enhanced prison sentence at all, because neither section 902.8 nor section 204.411 would apply. Surely the legislature did not intend that two-time felons who venture into the illegal drug trade for their third felony be treated more leniently than two-time felons whose third felony is a non-drug felony. Chapter 204 should be construed so as to avoid such an unreasonable and absurd result. *See, e g., Metier v. Cooper Transp. Co., Inc.*, 378 N.W.2d 907, 913 (Iowa 1985).

We also are not persuaded by Schery's assertion that the absence of the adjective "criminal" before the word "civil" in section 204.404 means that section 902.8 does not apply to the sentencing of violators of chapter 204. Section 204.404 provides:

> Any penalty imposed for violation of this division [including section 204.401] shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction otherwise authorized by law.

According to Schery, the language of this statute shows that any criminal penalty imposed by chapter 204 is in addition to any

civil or administrative penalty otherwise authorized by law, but in lieu of any criminal penalty otherwise authorized by law.

For the sake of argument, we will accept this reading of the statute. In our view, the fifteen-year prison sentence Schery received on each of counts I, II and III is not a criminal penalty imposed *separate* from chapter 204 and, therefore, superseded by chapter 204 under Schery's reading of the statute. Rather, it *is* the "penalty imposed for violation of this division" referred to in section 204.404. Chapter 204 simply borrows from chapter 902 in setting the length of the sentence for certain violations.

The district court and the court of appeals were correct in holding that Schery's maximum indeterminate prison sentence is fifteen years on each of counts I, II and III.[3]

B. *The minimum sentence.* Pursuant to the last sentence of section 902.8, the district court ordered that Schery serve a mandatory minimum prison term of three years on each of counts I, II and III. The court apparently did not consider Iowa Code section 204.413 which provides, in relevant part:

> A person sentenced pursuant to section 204.401, subsection 1, paragraph "a" or "b" shall not be eligible for parole until the person has served a minimum period of confinement of one-third of the maximum indeterminate sentence prescribed by law.

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[3] We express no opinion on the interplay between Iowa Code sections 204.411 and 902.9(2) in a situation where the terms of both might apply.

Because Schery was being sentenced pursuant to section 204.401(1)(b) on each of counts I, II, and III, her mandatory minimum prison sentence under section 204.413 would be one-third of fifteen years on each count, or five years.[4] Thus, under the circumstances of this case the last sentence of section 902.8 and the mandate of section 204.413 apparently conflict.

Schery, of course, did not argue to the court of appeals that she was erroneously sentenced to only a three-year minimum prison term. Consistent with her view of the maximum sentence in this case, Schery argued that the mandatory minimum prison sentence here is one-third of five years. Having correctly concluded that the maximum sentence in this case is fifteen years, however, the court of appeals was faced with the choice between the mandatory minimum sentence provisions of section 902.8 and section 204.413.

The minimum sentence provision of section 902.8 is a sentencing rule of general application. It applies through section 902.9 to any third felony conviction unless otherwise prescribed by statute. *See* Iowa Code § 902.9. Section 204.413, on the other hand, is a specific and special statute applicable only to sentencing violators of sections 204.401(1)(a) and 204.401(1)(b). Because section 902.9 and, through it, section 902.8, defers to sentences prescribed by

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[4] It is, perhaps, inaccurate to say that section 204.413 imposes a "mandatory minimum sentence," although that is the title of the code section. Under Iowa Code section 901.10, there are cases in which a minimum sentence under section 204.413 may be reduced by the sentencing court. Section 901.10 provides:

> A court sentencing a person for the person's first conviction under section 204.406, 204.413, or 902.7 may, at its discretion, sentence the person to a term less than provided by the statute if mitigating circumstances exist and those circumstances are stated specifically in the record. However, the state may appeal the discretionary decision on the grounds that the stated mitigating circumstances do not warrant a reduction of the sentence.

This case is Schery's first conviction under Iowa Code section 204.413. On remand, the district court should consider any mitigating circumstances before sentencing Schery under section 204.413. See *State v. Beaver*, 429 N.W. 2d 778, 780 (Iowa App. 1988).

other statutes, the court of appeals correctly applied the mandatory minimum sentence provision of section 204.413 to the exclusion of the last sentence of section 902.8.

We also note that even if the two statutes were viewed as directly conflicting, the conflict would be resolved in favor of section 204.413 by resort to the well-established rule that when statutes conflict and cannot be reconciled, general statutory provisions must yield to special ones. Iowa Code § 4.7; *State v. Farley*, 351 N.W.2d 537, 538 (Iowa 1984).

The court of appeals was correct in holding that Schery's minimum prison term is five years on each of counts I, II and III, subject to discretionary reduction under Iowa Code section 901.10.

III. *Correction of an illegal sentence.* Iowa Rule of Criminal Procedure 23(5)(a) provides that "[t]he court may correct an illegal sentence at any time." A sentence that is not authorized by statute is an illegal sentence. *See, e.g., State v. Suchanek*, 326 N.W. 2d 263, 265 (Iowa 1982). Rule 23(5) (a) means just what it says. See *State v. Ohnmacht*, 342 N.W. 2d 838, 843 (Iowa 1983). Simply stated, when a sentencing court departs – upward or downward – from the legislatively authorized sentence for a given offense, the pronounced sentence is a nullity subject to correction, on direct appeal or later. *Id.* at 842-45; *Suchanek*, 326 N.W. 2d at 265; *State v. Young*, 292 N.W. 2d 432, 435 (Iowa 1980).

Except by an exercise of its discretion under Iowa code section 901.10, the district court was not authorized to depart from the plain language of Iowa Code section 204.413. That statute requires that Schery serve no less than five years in prison on each of counts I, II, and III, but the district court ordered her to serve only three-year minimum terms on those counts. Schery does not even contend that the three-year terms were ordered pursuant to section 901.10; the record is clear that the district court simply did not consider sections 204.413 and 901.10. Rather, its order was based on the mistaken belief that only the minimum sentence called for in the last sentence of section 902.8 applied. The three-year minimum prison terms ordered in this case are illegal and must be corrected. *Cf. State v. Washington*, 356 N.W.2d 192, 196-97 (Iowa 1984) (where district court failed to exercise discretion in sentencing because it

erroneously believed that it had no discretion under the law, the case had to be remanded for resentencing).

Schery contends that even if a sentence is illegal, under Iowa law it may never be corrected if the error is in favor of the defendant. She bases this argument on Iowa Code section 814.20, which provides that on appeal from the district court, the appellate court may "order a new trial, or reduce the punishment, but shall not increase it."

In the first place, although the district court may increase Schery's sentence on remand, it may decide to leave it the same or even decrease it in light of mitigating circumstances that may exist in Schery's case. Under section 901.10, the court has discretion to reduce the mandatory minimum prison sentence specified in section 204.413. We express no opinion on what an appropriate sentence would be in this case.

In the second place, we do not agree that an illegal sentence may not be corrected if it is more lenient than allowed by law. Section 814.20 does not prevent correction of an illegal sentence by or at this court's direction, in direct contravention of rule of criminal procedure 23(5)(a). At most, section 814.20 might preclude us from increasing a sentence imposed by the district court in cases where the district court's sentence is legal. Whatever the scope of this statute, correction of an illegal sentence is outside its prohibition.

We have stated many times that an illegal sentence is a nullity subject to correction, even though correction may result in an increase in the sentence on remand. *See, e.g., Ohnmacht*, 342 N.W.2d at 843-44; *State v. Burtlow*, 299 N.W.2d 665, 668 (Iowa 1980); *State v. Wiese*, 201 N.W.2d 734, 738 (Iowa 1972). Our law on this point is in accord with the general rule in the United States. *See* 21 Am. Jur. 2d *Criminal Law* § 583 (1981 and Supp. 1990); Annotation, *Power of Court to Increase Severity of Unlawful Sentence—Modern Status*, 28 A.L.R. 4th 147 (1984 and Supp. 1989).

Schery also asserts that to increase her sentences on remand would violate the due process and equal protection guarantees of the United States Constitution. U.S. Const. amend. XIV, § 1. She cites no authority or argument in support of her assertions. We deem the constitutional issues waived. Iowa R. App. P. 14(a)(3).

IV. *Disposition.* The decision of the court of appeals, the district court convictions and the judgment on count IV are affirmed. The sentences on counts I, II and III are vacated. The case is remanded for resentencing on those counts, consistent with this opinion.

DECISION OF THE COURT OF APPEALS AFFIRMED; DISTRICT COURT CONVICTIONS AFFIRMED, THREE SENTENCES VACATED AND CASE REMANDED FOR RESENTENCING.

IN THE SUPREME COURT OF IOWA
No. 175 / 88-592
O R D E R

STATE OF IOWA,
Appellee,

vs.

SCHERY ANN DRAPER,
Appellant.

After consideration by the court, en banc, appellant's Petition for Rehearing in the above-captioned matter is hereby overruled and denied.

Done this 20th day of July, 1990.

THE SUPREME COURT OF IOWA

/s/ Arthur A. McGiverin
ARTHUR A. McGIVERIN
Chief Justice

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L O C A L

FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male

inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for service in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.